

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

IN THE MATTER OF)	Docket No. CWA-08-2003-0035
)	
Cenex Harvest States Cooperatives)	ADMINISTRATIVE COMPLAINT
5500 Cenex Drive)	AND NOTICE OF OPPORTUNITY
Inver Grove Heights, MN 55077,)	FOR HEARING
)	
(Eastern Farmer's Co-Op)	
Colton Bulk Plant Facility,))	
)	
Respondent.)	

AUTHORITY

1. This is a civil administrative action issued under the authority vested in the Administrator of the Environmental Protection Agency ("EPA") by Section 311(b)(6)(B)(ii) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1321(b)(6)(B)(ii), as amended by the Oil Pollution Act of 1990. The Administrator has properly delegated this authority to the undersigned EPA official. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules") set forth at 40 C.F.R. Part 22, a copy of which is enclosed.

GENERAL ALLEGATIONS

2. Respondent, Cenex Harvest States Cooperatives ("Respondent"), is a corporation organized under the laws of the State of Minnesota and is authorized to do business in the State of South Dakota.

3. Respondent is a "person" within the meaning of Sections 311(a)(7) and 502(5) of

the Act, 33 U.S.C. §§ 1321(a)(7) and 1362(5).

4. Respondent owns and/or operates the Eastern Farmer's Co-Op Colton Bulk Plant, a bulk petroleum distribution and storage facility, located at 104 E. Eighth Street, Colton, South Dakota ("Facility").

5. Respondent stores, transfers, distributes, uses or consumes oil or oil products at the Facility.

6. Respondent is an "owner and operator" of an "onshore facility" within the meaning of CWA Sections 311(a)(6) and (10), 33 U.S.C. §§ 1321(a)(6) and (10).

7. The Facility is a "non-transportation-related" "onshore facility" within the meaning of 40 C.F.R. § 112.2.

8. The Facility has a total above-ground storage capacity greater than 1,320 gallons of oil.

9. Any discharge from the Facility would flow to an unnamed tributary of the Colton Branch of Skunk Creek located approximately 1/8 mile north. Oil may reach the unnamed tributary by discharging into a swale located to the east of the tank farm, then draining north into a east-west depression, draining west until intersecting with a manmade ditch that parallels Highway 149 and ultimately draining from the ditch into the tributary. Alternatively, oil may reach the unnamed tributary by discharging in northwest/west direction from the Facility until intersecting with the manmade ditch paralleling Highway 149 until draining from the ditch into the tributary.

10. The Colton Branch of Skunk Creek and its tributaries are “navigable waters” and “waters of the United States” within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7) and 40 C.F.R. § 110.1.

11. Section 311(j)(1)(C) of the Act, 33 U.S.C. § 1321(j)(1)(C), provides that the President shall issue regulations "establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil . . . from vessels and from onshore and offshore facilities, and to contain such discharges"

12. EPA promulgated the Oil Pollution Prevention Regulations, set forth at 40 C.F.R. Part 112. 40 C.F.R. § 112.1(b) states that the requirements of Part 112 apply:

to owners or operators of non-transportation related onshore and offshore facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using or consuming oil or oil products, and which, due to their location, could reasonably be expected to discharge oil in harmful quantities, as defined in part 110 of this chapter, into or upon the navigable waters of the United States or adjoining shorelines.”

13. The Facility is a non-transportation onshore facility which, due to its location, could reasonably be expected to discharge oil to a navigable water of the United States (as defined by Section 502(7) of the Act, 33 U.S.C. § 1362(7), and 40 C.F.R. § 110.1) or its adjoining shoreline that may either (1) violate applicable water quality standards or (2) cause a film or sheen or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

14. The Facility is subject to the Oil Pollution Prevention requirements of 40 C.F.R. Part 112, pursuant to Section 311(j) of the Act, 33 U.S.C. § 1321(j).

15. 40 C.F.R. § 112.3 requires that owners or operators of onshore and offshore facilities prepare a written Spill Prevention, Control, and Countermeasure (“SPCC”) Plan in accordance with Section 112.7, and other applicable sections of Part 112.

16. 40 C.F.R. § 112.7-8 sets forth the mandatory guidelines for the preparation and implementation of a SPCC Plan for this type of onshore facility, including but not limited to guidelines pertaining to equipment failure; containment or diversionary structures; inspections, test and records; personnel, training and discharge prevention procedures; security; and facility tank car and tank truck loading/unloading operations. 40 C.F.R. § 112.7 also mandates that a SPCC Plan be prepared in accordance with good engineering practices.

17. Section 311(b)(6)(A) of the Act, 33 U.S.C. § 1321(b)(6)(A), states in pertinent part that any owner, operator, or person in charge of any vessel, onshore facility or offshore facility (ii) who fails or refuses to comply with any regulation issued under subsection (j) of this section to which that owner, operator, or person in charge is subject, may be assessed a class I or class II civil penalty by ... the Administrator.

18. Pursuant to Section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(B)(ii), the amount of a class II civil penalty under subparagraph (A) may not exceed \$10,000 per day for each day during which the violation continues except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed \$125,000. The penalty per day has been increased to \$11,000 per day and the maximum penalty has increased to \$137,500 under the Civil Monetary Penalty Inflation Adjustment Rule, promulgated at 40 C.F.R. Part 19, for violations occurring after January 31, 1997.

19. On or about September 5, 2001, EPA conducted an unannounced SPCC inspection ("the Inspection") at the Facility.
20. At the time of the Inspections, at least nine aboveground storage tanks with a capacity of approximately 89,300 gallons existed at the Facility.
21. The Facility did not have a written SPCC Plan at the time of the Inspection. One was subsequently prepared on December 28, 2001, and provided to EPA upon request.
22. The following conditions existed at the Facility at the time of the Inspection:
- (1) no secondary containment existed to prevent spilled oil from the nine (9) above-ground storage tanks entering the storm drainage system;
 - (2) fuel storage tanks were not subject to scheduled integrity testing;
 - (3) no secondary containment existed for the 300 gallon portable fuel storage tank;
 - (4) no secondary containment existed around the fuel loading/unloading area;
 - (5) partially-buried pipes were not protected from corrosion;
 - (6) no warning or barrier system existed to prevent delivery trucks from moving prematurely during fueling operations;
 - (7) dents in Tank G and rust on other tanks evidenced that inspections and maintenance were not conducted at regular intervals. No written inspections procedures or records were kept;
 - (8) the Facility was not fenced;
 - (9) the master flow valves were unlocked and the pump starter controls were not locked in the "off" position.

23. Respondent failed to prepare and implement a written SPCC plan in accordance with the regulations at 40 C.F.R. § 112.7 as required by 40 C.F.R. § 112.3.

24. Respondent's failure to prepare and implement a written SPCC plan for its Facilities in accordance with the regulations at 40 C.F.R. § 112.7 constitutes violations of 40 C.F.R. § 112.3 and CWA § 311(b)(6)(A)(ii), 33 U.S.C. § 1321(b)(6)(A)(ii), and is subject to a maximum penalty of \$11,000 per day of violation.

PROPOSED PENALTY

Based on the foregoing Allegations and pursuant to the authority of Section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(B)(ii), Complainant proposes the assessment of administrative penalties against the Respondent in the amount of \$32,500. Complainant proposes this penalty amount after considering the applicable statutory penalty factors in Section 311(b)(8) of the Act, 33 U.S.C. § 1321(b)(8): (1) Respondent's alleged violations, the seriousness of the violations, the economic benefit to the violator resulting from the violations, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other factors as justice may require. Specifically, the proposed penalty amount is based on Respondent's major non-compliance and moderate environmental impact for a duration of at least 17 months with a minor degree of culpability. The Respondent did not qualify for any penalty reduction based on mitigation factors. No additions were made to the proposed penalty amount based on either a history of violations or economic benefit.

TERMS OF PAYMENT FOR QUICK RESOLUTION

If Respondent does not contest the findings and penalty proposal set out above, this action may be resolved by paying the proposed penalty in full pursuant to 40 C.F.R. § 22.18. If such payment is made within 30 calendar days of receipt of this Complaint, no Answer need be filed. For more time for payment, Respondent may file a statement agreeing to pay the penalty within 30 days of receipt of the Complaint, then pay the money within 60 days of such receipt. Payment is to be made by sending a cashier's or certified check payable to "Oil Spill Liability Trust Fund," with the docket number and name of the facility written on the check, to:

Jane Nakad
Technical Enforcement Program (8ENF-T)
U.S. EPA Region VIII
999 18th Street, Suite 300
Denver, CO 80202-2466

Payment of the penalty in this manner does not relieve Respondent of its obligation to comply with the requirements of the statute and regulations. Payment of the penalty in this manner shall constitute consent by Respondent to the assessment of the proposed penalty and a waiver of Respondent's right to a hearing on this matter.

OPPORTUNITY TO REQUEST A HEARING

As provided in the Act, a Respondent has the right to a public hearing to contest this Complaint. If you (1) contest the factual claims made in this Complaint; (2) contest the appropriateness of the proposed penalty; and/or (3) assert that you are entitled to judgment as a matter of law, you must file a written Answer in accordance with section 22.15 and 22.38 of the Consolidated Rules within 30 calendar days after receipt of this Complaint. Your Answer must (1) clearly and directly admit, deny, or explain each of the factual allegations contained in the

Complaint with regard to which you have knowledge; (2) state circumstances or arguments which are alleged to constitute grounds for defense; (3) state the facts you dispute; (4) the basis for opposing the proposed relief, and (5) specifically request an administrative hearing, if desired. Failure to admit, deny, or explain any material factual allegation in this Complaint will constitute an admission of the allegation.

The Answer and one copy must be sent to:

Tina Artemis, Regional Hearing Clerk (8RC)
U.S. EPA Region VIII
999 18th Street, Suite 300
Denver, Colorado 80202-2466

and a copy must be sent to the following attorney:

Amy Swanson, Enforcement Attorney (8ENF-L)
U.S. EPA Region VIII, Legal Enforcement Program
999 18th Street, Suite 300
Denver, CO 80202-2466
Telephone: (303) 312-6906

IF YOU FAIL TO REQUEST A HEARING, YOU WILL WAIVE YOUR RIGHT TO FORMALLY CONTEST ANY OF THE ALLEGATIONS SET FORTH IN THE COMPLAINT.

IF YOU FAIL TO FILE A WRITTEN ANSWER OR PAY THE PROPOSED PENALTY WITHIN THE 30 CALENDAR DAY TIME LIMIT, A DEFAULT JUDGMENT MAY BE ENTERED PURSUANT TO 40 C.F.R. § 22.17. THIS JUDGMENT MAY IMPOSE THE PENALTY PROPOSED IN THE COMPLAINT.

SETTLEMENT CONFERENCE

The EPA encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations and is willing to explore this possibility in an informal settlement conference. If you or your attorney, if you choose to be

represented by one, have any questions or wish to have an informal settlement conference with EPA, please call Amy Swanson at (800) 227-8917, extension 6906, or (303) 312-6906. Please note that a request for, scheduling of, or participation in a settlement conference does not extend the period for filing an Answer and request for hearing as set out above. The settlement process, however, may be pursued simultaneously with the administrative litigation procedures found in the Consolidated Rules. If a settlement can be reached, its terms must be expressed in a written consent agreement, signed by the parties and incorporated into a final order signed by the Regional Judicial Officer.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION VIII
Complainant.

Date: 02/18/03

SIGNED

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Date: 02/18/2003

SIGNED

Amy Swanson, Enforcement Attorney
U.S. EPA, Region VIII
999 18th Street, Suite 300 (8ENF-L)
Denver, CO 80202-2466
Colorado Atty. Reg. No. 26488
Telephone: 303/312-6906
Facsimile: 303/312-6953

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING was hand-carried to the Regional Hearing Clerk, EPA Region VIII, 999 18th Street, Suite 300, Denver, Colorado, and that a true copy of the same was sent as follows:

Copy via hand-delivery to:

Honorable Alfred C. Smith
Regional Judicial Officer
U.S. EPA
999 18th Street, Suite 500 (8RC)
Denver, CO 80202-2466

Copy via certified mail to:

CT Corporation
Registered Agent for Cenex Harvest States Cooperatives
319 S. Coteau
Pierre, SD 57501

02/20/03
Date

SIGNED
Judith McTernan

**IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS FOR THIS DOCUMENT
PLEASE CONTACT THE REGIONAL HEARING CLERK.**

**THIS DOCUMENT WAS FILED IN THE REGIONAL HEARING CLERK'S OFFICE
ON FEBRUARY 20, 2003.**